Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

NO. 76-399

KENNETH M. CRUMPLER, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI

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PETITION FOR WRIT OF CERTIORARI

To The United States Court Of Appeals, Fifth Circuit:

Petitioner prays the Court that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in the above entitled cause entered on August 9, 1976.

OPINIONS BELOW

The opinion of the Court of Appeals is printed in Appendix A beginning at page 1A. The order denying the petition for rehearing is printed in Appendix A beginning at page 5A.

JURISDICTION

The judgment of the Court of Appeals was entered on August 9, 1976. Rehearing was denied on August 30, 1976. The jurisdiction of this court is involved under 28 U.S.C., Sec. 1254(1).

QUESTIONS PRESENTED

1. Whether the Petitioner can be prosecuted for possession of ordnance materials when said materials were issued while Petitioner was on active duty in the United States Army.

2. Whether the search in the instant case was based partially on a search which the Fifth Circuit Court of Appeals previously held unlawful.

3. Whether the District Court erred in failing to order production of a witness statement under the Jencks Acts.

STATUTES INVOLVED

The statutes involved in this case are Title 18, U.S.C., Section 3500, Title 26, U.S.C., Sec. 5861 d & i, and Sec. 5871.

STATEMENT OF THE CASE

The Petitioner was convicted for possession of unregistered firearms and improperly storing explosive materials. The Petitioner was at all times material to the prosecution an officer in the National Guard having the position of Commander in the Rio Grande Valley Guard, immediately prior to his prosecution. The Petitioner received the items for which he was prosecuted while on active duty in the United States Army in 1962, (R-Supp., 325-370). The Government's testimony established that these items issued were not subject to registration. (R-238-251). As a matter of law, the Court of Appeals erred in holding that Petitioner was not authorized to have the items he was prosecuted for because said finding is in direct conflict to the Government's testimony and the Defendant's testimony regarding the manner of acquisition of these items by Petitioner.

The Fifth Circuit Court of Appeals held in Cause No. 74-2193 decided January 29, 1975, that a search of the premises of Petitioner was illegal and that all items found there would be suppressed from being offered in evidence. The Government proceeded to take the information discovered in the illegal search and make it part of an affidavit to conduct the search in this case some six (6) months later. The record establishes that the same items which were present during illegal search were present during the search which the Fifth Circuit has held to be legal in this case.

The Government offered the witness Mozey, who was the agent in charge of the investigation in this case. It was established by his testimony that he had made certain statements and reports and these were requested to be produced for cross examination of witness. The Petitioner never saw the statements and to Petitioner's knowledge said statements by Mozey were not made part of the record on appeal in order for the Fifth Circuit Court or this Court to determine the nature of the statements made.

REASONS FOR GRANTING THE WRIT

Petitioner has demonstrated that he was in active duty with the United States Army at the time the firearms and explosives were issued. The Government has established that a person who received firearms and explosives while on active duty is not required to register them nor store them.

There is a conflict of decision in the Fifth Circuit between United States of America v. Crumpler, No. 74-2193 and United States of America vs. Crumpler, No. 75-366-A in that same evidence is involved in both cases and the former case suppressed all evidence from its offer, whereas, the later case admitted all said evidence.

The Jencks Act makes it very clear that a witness' statement has to be produced on cross examination and the fact that it is inclusive of other statements of other persons does not preclude its production. 18 USCA, Section 3500, *Alderman v. United States*, 89 S.Ct. 961. This Writ should be granted in order for the Court to have a uniformity of decision regarding production of statements and to reconcile the decisions of the Fifth Circuit with those of the Ninth Circuit. *United States v. Howard*, 450 F.2d 792 (9th Cir. 1971), *United States v. Blackburn*, 446 F.2d 1089 (5th Cir., 1971), cert. denied, 404 U.S. 1017, 92 S.Ct. 679, 30 L.Ed.2d 665 (1972). The Court should further grant the writ in order to clarify the conflict between the two Crumpler decisions regarding the search and seizure. *Clay v. United States*, 246 F.2d 298, 5th Cir., 1957 and *United States v. Sterling*, 369 F.2d 799, 3rd Cir. 1966.

CONCLUSION

For the reasons stated above the Writ of Certiorari should be granted.

Respectfully submitted,

THOMAS GILBERT SHARPE, JR.
Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Petition for Writ of Certiorari was served upon the Solicitor General of the United States of America properly addressed on the _____ day of September, 1976.

THOMAS GILBERT SHARPE, JR.

APPENDIX A

UNITED STATES of America,
Plaintiff-Appellee,

v.

Kenneth M. CRUMPLER,
Defendant-Appellant.

No. 75-3668

Summary Calendar.*

UNITED STATES COURT OF APPEALS,
Fifth Circuit.

Aug. 9, 1976.

Defendant was convicted in the District Court for the Southern District of Texas, Owen D. Cox, J., of possession of unregistered and improperly identified firearms and unlawful storing of explosive materials and he appealed. The Court of Appeals held that probable cause to search existed even after certain matter was excised from affidavit; that introduction of expert testimony concerning destructive character of explosive devices found in defendant's business premises instead of introduction of the components themselves did not deny due process; that case report of investigating agent which contained summarized testimony of other witnesses was not producible under the Jencks Act; and that testimony by national guard officer demonstrated that defendant had not come into possession

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* Rule 18, 5 Cir.; see *Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York et al.*, 5 Cir., 1970, 431 F.2d 409, Part. I.

of the materials legally while on active duty as a member of the guard.

Affirmed.

* * *

Appeal from the United States District Court for the Southern District of Texas.

Before AINSWORTH, CLARK and RONEY, Circuit Judges.

PER CURIAM:

Kenneth M. Crumpler appeals from his conviction on counts of illegal possession of unregistered and improperly identified firearms, *see* 26 U.S.C. §§ 5861(d)(i), 5871, and unlawful storing of explosive materials in violation of 18 U.S.C. § 842(j). He received three-year sentences for each of the firearms counts and a one-year sentence on the explosives count, to run concurrently, and a total of nine thousand dollars in fines. Finding no merit in his four alleged grounds of error, we affirm.

[1] Crumpler urges that because the search of his business premises found the same items as a prior search held unlawful by this court and was conducted pursuant to a warrant alleging some of the facts that had led to the prior search, his motion to suppress should have been granted. However, the district court held that, after improper matter was excised from the second affidavit, it still contained sufficient credible information to supply probable cause to search. This procedure is clearly permissible. *See United States v. Hunt,* 496 F.2d 888, 894 (5th Cir. 1974). We have examined the language of the affidavit and the reasoning of the district court expressed in its

memorandum opinion and order of July 17, 1975, and we agree that it was proper to deny the motion to suppress.

[2] Crumpler's second point is that the substitution of expert testimony concerning the destructive character of the explosive devices for introduction of the seized components themselves offended due process standards by conveying a false impression to the jury that the materials taken from Crumpler in themselves were explosives. However, Crumpler's counsel brought out on cross-examination that the explosions caused in pretrial tests by using the seized items required the application of electric power and that the witness could not testify that the components *had* been hooked together to cause the explosions, only that they *could* be. Since the components meet the statutory standards for classification as a firearm, 26 U.S.C. § 5845(a)(8) & (f)(1-3), and any misleading inferences the jury could have drawn from the Government's evidence alone were sufficiently clarified on cross-examination, we find no violation of due process in these circumstances.

[3] Crumpler's third assertion is that the failure to order production of Agent Mozey's case report violated the Jencks Act, 18 U.S.C. § 3500. The record reflects that the district court examined the report *in camera* and concluded that its production was not required because it merely summarized the accounts to be given by other witnesses. We agree. The Jencks Act requires the production of "statements," which have been "signed or otherwise adopted or approved by [the witness.]" 18 U.S.C. § 3500(e)(1). As to the summarized testimony of other witnesses, Mozey's report was not a producible statement.

See United States v. Howard, 450 F.2d 792 (9th Cir. 1971); cf. *United States v. Blackburn,* 446 F.2d 1089 (5th Cir. 1971), *cert. denied,* 404 U.S. 1017, 92 S.Ct. 679, 30 L.Ed.2d 665 (1972). Moreover, neither the portions of the case report pertaining to other witnesses nor those pertaining to his own testimony would have furnished anything to the defense that was not supplied before the cross-examination of the individual witnesses, including Mozey himself. In these circumstances, there was no error in failing to require production of the summary case report.

[4] Crumpler's fourth and final argument is that he came into possession of the materials legally while on active duty as a member of the National Guard. This argument was rejected by the trier of fact after receiving testimony from a National Guard officer that removal of ordnance materials from Guard posts was not authorized. We decline to disturb this finding or the legal conclusion based thereon.

The convictions are

AFFIRMED.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 75-3668

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

KENNETH M. CRUMPLER
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas

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ON PETITION FOR REHEARING

(August 30, 1976)

Before AINSWORTH, CLARK and RONEY, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

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v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-399

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted of unlawfully possessing unregistered and improperly identified firearms, in violation of 26 U.S.C. 5861 (d) and (i) and 5871, and of unlawfully storing explosive materials, in violation of 18 U.S.C. 842(j). He was sentenced to three years' imprisonment on the firearms counts and one year's imprisonment on the explosives count, the sentences to run concurrently, and to fines totalling $9,000. The court of appeals affirmed (Pet. App. A).

Petitioner contends (1) that the search that disclosed the firearms and explosives was unlawful because the underlying warrant was partially based on a prior search that the court of appeals had held to be unlawful in another case; (2) that his possession of the firearms and explosives

was not unlawful because they had been issued to him while he was on active duty with the National Guard; and (3) that the case report of an agent-witness was withheld from him in violation of 18 U.S.C. 3500.

1. The firearms and explosives were found and seized during a search of petitioner's business premises made pursuant to warrant by federal agents. Six months earlier local police officers had entered the premises because they believed that a burglary was in progress and had found and seized numerous firearms and other similar devices. In a subsequent federal prosecution for possession of unregistered firearms, petitioner's motion to suppress was granted when the government failed to produce the police officers as witnesses to establish that the seized firearms had been in plain view. *United States* v. *Crumpler*, 507 F. 2d 624 (C.A. 5).

The search in the instant case followed an explosion in a city-owned trash container located behind petitioner's premises.[1] Local fire officials examined the contents of the container and found the barrel of a revolver and ignition fuses used in military hand grenades. Petitioner admitted to a fire marshal that he had thrown the revolver barrel into the container. These facts, as well as the facts pertaining to the earlier seizure, were set forth in the affidavit in support of the application for the search warrant.

Both courts below correctly held that, even after striking the statements regarding the earlier seizure, the remaining averments in the affidavit—concerning the trash container explosion, the hand grenade fuses, and petitioner's admission to the fire marshal—were sufficient to

[1]See the July 17, 1975 Memorandum and Order of the district court (reproduced at pages 1-12 of the government's brief on appeal, a copy of which we are lodging with the Clerk of this Court) denying petitioner's pretrial motion to suppress.

establish probable cause and to justify issuance of the search warrant (Pet. App. 2A). This essentially factual determination does not merit further review by this Court.[2]

2. Petitioner testified at trial that in 1962, in his capacity as a Company Commander in the National Guard, he had confiscated the items that were the subject of the indictment and had "stored" them at his place of business for eleven years to keep other people from using them.[3] Petitioner claims that that testimony established as a matter of law that his possession of the items was lawful.

Petitioner cites no statute or regulation that would even arguably have authorized his conduct. In fact he possessed no lawful authority to remove the items from government premises, and a National Guard officer testified to this effect (Pet. App. 4A). Even assuming that this was a matter for the trier of fact, the jury found against petitioner, and there is no reason to disturb that result.

3. The district court correctly ruled that Agent Mozey's case report was not producible under the Jencks Act following Mozey's testimony. That report, which the court inspected *in camera*, consisted of summaries of the expected testimony of other witnesses. As such the report was hearsay as to the agent and did not "relate to the subject matter of [his] testimony." See 18 U.S.C. 3500(c).

[2]While it is unnecessary for the Court to reach the question in this case, it is our position that the deterrent purposes of the exclusionary rule are not served by extending its application to the fruits of an illegal search when the crime of which a defendant stands charged occurred after the allegedly unlawful search.

[3]See the government's brief on appeal, pp. 20-21.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JANUARY 1977.

DOJ-1977-01